

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Case No. 2:13-cr-00295-GMN-PAL

Plaintiff,

REPORT OF FINDINGS AND  
RECOMMENDATION

v.

KEVIN BANG WINN,

(Mtn to Dismiss – Dkt. #32)

Defendant.

This matter is before the court on Defendant Kevin Bang Winn’s (“Winn”) Motion to Dismiss Indictment (Dkt. #32). This matter was referred to the undersigned for findings and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. The court has considered the Motion, the government’s Opposition (Dkt. #33), Winn’s Reply (Dkt. #34), and the government’s Supplement (Dkt. #35).

**BACKGROUND**

On July 31, 2013, a federal grand jury returned an Indictment (Dkt. #1) against Winn, charging him with eleven counts of Health Care Fraud – Medicare in violation of 18 U.S.C. § 1347. The Indictment alleges that between March 2006 and August 2008, Winn knowingly and willfully executed and attempted to execute a scheme and artifice to defraud a healthcare benefit program and to obtain by materially false and fraudulent pretenses, representations, and promises, money owed by and under the custody of the federal Medicare program in connection with the delivery of, and payment for, health care benefits, items, and services. The scheme allegedly involved fraudulently billing Medicare for durable medical equipment (“DME”) which was not provided to the patient and not medically necessary.

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Specifically, the Indictment alleges that as part of the scheme, Winn operated Desert Medical Equipment (“Desert”), a durable medical supply company located in Las Vegas, Nevada. Between March 2006 and August 2008, Medicare allegedly paid Desert \$640,000 for DME Desert allegedly provided to its customers. As part of the scheme, Winn allegedly (a) submitted and caused to be submitted fraudulent claims for DME that were never provided to Desert’s customers; (b) submitted and caused to be submitted fraudulent claims for DME that were not medically necessary and had not been prescribed by a doctor; (c) forged or caused to be forged prescriptions and falsified or caused to be falsified certificates of medical necessity to make it appear as if a doctor had ordered a product for Desert’s customers; and (d) paid or caused to be paid “marketers” in Southern California to obtain patients for Desert. The marketers allegedly provided patients with money in exchange for the patients’ Medicare information which was allegedly used to bill Medicare for items not provided. The Indictment also contains two forfeiture allegations.

## **DISCUSSION**

### **I. The Parties’ Positions.**

#### **A. Winn’s Motion to Dismiss (Dkt. #32)**

In the Motion to Dismiss, Winn argues that he completely disassociated himself from the alleged conspiracy or any further unlawful acts relating to this case in June 2008. As a result, he argues this case was filed outside the applicable statute of limitations and should be dismissed. Healthcare fraud charges under 18 U.S.C. § 1347 carry a five-year statute of limitations under 18 U.S.C. § 3282. Citing *Toussie v. United States*, 397 U.S. 112, 115 (1970), Winn argues that the statute of limitations generally begins to run when the crime is complete. In a non-conspiracy case, the crime is complete when the last element of the crime has been satisfied. In a conspiracy case, the statute of limitations is tolled upon the last act committed in furtherance of the conspiracy. However, overt acts of concealment that occur after completion of the objectives of the conspiracy cannot delay running of the statute of limitations because conspiracies frequently involve attempts to conceal the acts involved. In this case, Winn is not charged with conspiracy.

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1 Therefore, the healthcare fraud counts of the Indictment, which all occurred between 2005 and  
2 the first half of 2008, are time-barred.

3 Winn argues that he left Las Vegas in approximately June 2008 after realizing he had a  
4 gambling problem. He returned to California and let his Las Vegas home go into foreclosure.  
5 By July 2008, he was working as an IT specialist in California when Elegria Phankonsky, a  
6 distant relative, continued to operate Desert in Winn's absence. Winn claims he had no further  
7 involvement or material contact with Ms. Phankonsky or Desert and no longer received monies  
8 from the business after June 2008. His motion is supported by an FBI interview of him on May  
9 24, 2013, which is attached to the motion as Exhibit "A". The attached FBI 302 indicates the  
10 FBI obtained records from Winn's financial accounts and determined there was very little  
11 activity in the relevant account from June 2008 until it was closed in August 2008 for being  
12 overdrawn. The 302 also relates what Winn told the FBI about realizing that he was developing  
13 a gambling problem, that he did not enjoy the DME business, and that he decided in  
14 approximately June 2008 to leave Las Vegas and return to California.

15 Winn contends that because he broke all ties with Ms. Phankonsky and Desert when he  
16 left Las Vegas for California in June 2008, he "effectively ended his involvement with any  
17 further violations of 18 U.S.C. § 1347." The eleven counts in the Indictment were drafted in  
18 such a way that the dates of the "payments" made by Medicare to Desert are used as the date of  
19 the violation. However, Winn argues that the "operative dates should be the dates during which  
20 the alleged fraudulent requests for payment were submitted to Medicare." If the dates of the  
21 fraudulent submissions to Medicare are used, they all fall before July 31, 2008. Because the  
22 Indictment in this case was not returned until July 31, 2013, and the dates of the alleged  
23 fraudulent submissions occurred before July 31, 2008, all of the crimes charged in the Indictment  
24 are barred by the applicable five-year statute of limitations.

25 **B. The Government's Opposition (Dkt. #33).**

26 The government opposes the motion, asserting that the gravamen of the Indictment is that  
27 Winn fraudulently billed Medicare for items of DME which were not provided to patients and  
28 which were not medically necessary. The Indictment also alleges that Winn prepared, or caused

1 to be prepared, false paperwork “to make it appear as if the physician had ordered a product” for  
2 customers, and paid marketeers to solicit patient information used to bill Medicare for items not  
3 provided. The Indictment alleges Winn engaged in this scheme on eleven different occasions by  
4 submitting fraudulent claims for Medicare reimbursements. Medicaid paid these claims between  
5 November 27, 2007, and August 27, 2008. The United States acknowledges that 18 U.S.C.  
6 § 3282 establishes a five-year statute of limitation for the healthcare fraud counts charged in the  
7 Indictment. The government concedes that the way this Indictment was drafted is to reflect that  
8 the violations occurred on the date of the payments by Medicare to Desert. The government also  
9 concedes that pursuant to 18 U.S.C. § 1347, the operative dates should be the dates on which the  
10 alleged fraudulent request for payments were submitted to Medicare. The discovery provided in  
11 this case demonstrates that the claims related to counts six through nine were paid on August 6,  
12 2008, and received on August 4, 2008. The claims related to counts ten and eleven were paid on  
13 August 27, 2008, and received by Medicare August 25, 2008. Thus, the crimes charged in  
14 counts six through eleven plainly fall within the applicable five-year statute of limitations.

15 With respect to counts one through five, the government concedes that they occurred  
16 more than five years prior to July 31, 2013, when the Indictment was returned. However, the  
17 government contends that they also occurred within the statute of limitations because they are  
18 part of a continuing offense. The healthcare fraud statute was modeled after the bank fraud  
19 statute, and every court that has addressed the issue has concluded that healthcare fraud is a  
20 continuing offense. Although the Ninth Circuit has not yet decided whether a healthcare fraud  
21 offense is a continuing offense, it has consistently held that bank fraud is a continuing offense.  
22 Under controlling Ninth Circuit authority, the crime of bank fraud is not complete until the entire  
23 scheme is completed. The government argues that because the healthcare fraud statute is  
24 modeled after the bank fraud statute, the crime of healthcare fraud is not completed until all of  
25 the fraudulent submissions to Medicare are made. The government contends that unlike the mail  
26 and wire fraud statutes, which punish each use of the mail or wire, the bank fraud statute  
27 punishes each execution of the overall scheme, citing *United States v. Molinaro*, 11 F. 3d. 853,  
28 859 (9th Cir. 1993).

1 In this case, the last allegedly fraudulent claims were submitted within the statute of  
2 limitations, and therefore, the fraudulent submissions more than five years old are not time-  
3 barred. Finally, the government contends that Winn's arguments about completely  
4 disassociating himself from Desert in June 2008 are factual disputes which the court may not  
5 address in a motion to dismiss the indictment.

6 **C. Winn's Reply (Dkt. #34)**

7 Winn's Reply concedes that this court could find that healthcare fraud is a continuing  
8 offense. However, in this case, Winn is not charged with being a member of a conspiracy, and  
9 the government must therefore show that Winn himself committed the acts charged in the eleven  
10 counts of the Indictment. The Indictment in this case charges each of the eleven offenses as a  
11 separate crime, and the government must therefore prove that Winn committed each offense.  
12 Even if the eleven offenses are related, Winn argues that "the issue still remains whether Winn  
13 committed any illegal act amounting to healthcare fraud after June 2008." The problem with the  
14 government's continuing offense argument is that the government has not alleged a conspiracy in  
15 this case. Counts one through five occurred outside the five-year statute of limitations. Counts  
16 six through eight allegedly occurred within the five-year statute of limitations, but months after  
17 the offenses alleged in one through five, and only after "Winn was long gone." Winn contends  
18 that the continuing offense doctrine "cannot save this Indictment because the issue of withdrawal  
19 still controls the outcome."

20 The Reply argues that the single factual question before the court in determining this  
21 motion to dismiss is when Winn ended his involvement with Desert. The FBI reports indicate  
22 the FBI determined that by June 2008, Winn had moved from Las Vegas and ended his  
23 involvement. Thus, counts six through eleven were committed by another individual after Winn  
24 was no longer involved at any level, and they must be dismissed.

25 **D. The Government's Supplement (Dkt. #35).**

26 The government filed a Supplement (Dkt. #35) "to facilitate the court's review of the  
27 parties' arguments and the Defendant's review of the evidence in this case." The Supplement  
28 contains information provided by Noridian, the third-party administrator for Medicare,

concerning when each claim charged in the indictment was received by Medicare. According to the government's Supplement, the claims charged in counts one through five were received by Noridian between November 21, 2007, and April 10, 2008. The claims charged in counts six through eleven were received between August 3, 2008, and August 24, 2008. In a footnote, the government states that because the claims were electronically submitted, "the date of receipt by Medicare is approximately equal to the date of the submission." Supplement (Dkt. #35) at 2 n.1.

## **II. Applicable Law & Analysis.**

### **A. Rule 12(b).**

Pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure, "Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion." A motion to dismiss is generally capable of determination before trial "if it involves questions of law rather than fact." *See United States v. Yip*, 248 F. Supp. 2d 970, 972 (D. Haw. 2003) (citing *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452 (9th Cir.), *cert. denied*, 478 U.S. 1007 (1986)). Generally, the court should not consider evidence appearing outside the four corners of the indictment and "must accept the facts alleged in that indictment as true." *United States v. Ruiz-Castro*, 125 F. Supp. 2d 411, 413 (D. Haw. 2000) (citing *Winslow v. United States*, 216 F.2d 912, 913 (9th Cir. 1954), *cert. denied*, 349 U.S. 922 (1955)). The indictment itself should be (1) read as a whole; (2) read to include facts which are necessarily implied; and (3) construed according to common sense. *United States v. Blinder*, 10 F.3d 1468, 1471 (9th Cir. 1993) (citing *United States v. Buckley*, 689 F.2d 893, 899 (9th Cir. 1982), *cert. denied*, 460 U.S. 1086 (1983)). The court's inquiry must end there. Arguments directed at the merits of the claims must be left for trial.

The Ninth Circuit has instructed that Rule 12(b) motions are usually appropriate to consider legal issues such as double jeopardy, previous conviction or acquittal, statute of limitations, immunity, and jurisdiction. *See United States v. Smith*, 866 F.2d 1092, 1096 n 3 (9th Cir.1989). However, where the legal issues are "intermeshed with questions going to the merits," they should be determined at trial. *See United States v. Nukida*, 8 F.3d at 670 (9th Cir.

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1 1993) (citing *United States v. Ayarza-Garcia*, 819 F.2d 1043, 1048 (11th Cir.), *cert. denied*, 484  
2 U.S. 969 (1987)), *appeal after remand*, 87 F.3d 1324 (9th Cir. 1996).

3 In deciding pretrial motions to dismiss, the court may not “invade the province of the  
4 ultimate finder of fact.” *Id.* at 679. Pretrial motions requiring the court to decide issues of fact  
5 may only be decided if the fact determinations are “entirely severable from the evidence to be  
6 presented at trial.” *Id.* Where the defendant’s motion to dismiss is “substantially founded upon  
7 and intertwined with” evidence concerning the alleged offense, the motion should be determined  
8 by the ultimate finder of fact and must be deferred until trial. *Id.* A motion to dismiss the  
9 indictment may not be used to conduct a “summary trial of the evidence.” *United States v.*  
10 *Boren*, 278 F.3d 911, 914 (9th Cir. 2002) (citing *United States v. Jensen*, 93 F.3d 667, 669 (9th  
11 Cir. 1996)). As the Ninth Circuit explained, the Rule 12 cannot be used to determine general  
12 issues of guilt or innocence, and helps ensure that the “respective provinces of the judge and jury  
13 are respected.” *Id.* at 669.

14 In *Nukida*, the defendant was charged with tampering with consumer products in  
15 violation of 18 U.S.C. § 1365. She filed a motion to dismiss the indictment in the district court,  
16 arguing that: (a) her alleged conduct did not affect interstate commerce; (b) the charges in the  
17 indictment failed to state an offense; and (c) the district court lacked subject matter jurisdiction  
18 over the case. *Id.* at 669. The district court granted Nukida’s motion and dismissed the  
19 indictment pursuant to Rule 12(b). *Id.* at 668-69. The Ninth Circuit reversed, finding that the  
20 district court exceeded its authority when it determined a material element of the offense charged  
21 in the indictment, specifically, that the products allegedly tampered with did not then affect  
22 interstate commerce. This was a material element which should have been reserved for the  
23 finder of fact at trial because “a motion to dismiss is not the proper way to determine a factual  
24 defense.” *Id.* at 669, 672 (citing *United States v. Snyder*, 428 F.3d 520, 522 (9th Cir.), *cert.*  
25 *denied*, 400 U.S. 903 (1970), and *United States v. Smith*, 866 F.2d 1092, 1096 n.3 (9th Cir.  
26 1989)).

27 For purposes of a pretrial motion to dismiss, the court should not consider evidence  
28 outside the four corners of the indictment, and it must accept the facts alleged in the indictment

1 as true. Whether, and if so, when Winn ceased any involvement in Desert and the fraudulent  
2 healthcare scheme alleged in the Indictment is a question of fact for the jury which may not be  
3 determined in a motion to dismiss. However, Winn's statute of limitations arguments raise legal  
4 issues the court should consider in a motion to dismiss.

5 **B. Statute of Limitations.**

6 Both Winn and the government agree that 18 U.S.C. § 3282(a), which establishes a five-  
7 year statute of limitations for most federal crimes, applies. Under 18 U.S.C. § 3282(a), an  
8 indictment for a non-capital offense must be brought within five years "after such offense shall  
9 have been committed." *Id.*

10 Ordinarily, the statute of limitations begins to run when the crime is complete. *See*  
11 *Toussie*, 397 U.S. at 115. A crime is complete when each element of the crime has occurred.  
12 *United States v. Smith*, 740 F. 2d. 734, 736 (9th Cir. 1984). Courts deciding when the statute of  
13 limitations begins to run in a given case must consider the purposes of the statute of limitations.  
14 *Toussie*, 397 U.S. at 114. A statute of limitations limits exposure to criminal prosecution to a  
15 fixed period of time following the occurrence of acts the legislature has decided to punish by  
16 criminal sanctions. *Id.* It is designed to protect individuals from having to defend themselves  
17 against charges when facts may have become obscured by the passage of time. *Id.* It minimizes  
18 the danger of punishment for acts in the distant past and "may also have the salutary effect of  
19 encouraging law enforcement officials promptly to investigate suspected criminal activity." *Id.*  
20 at 114-15. For these reasons, the Supreme Court has held that statutes of limitations should be  
21 liberally construed in favor of repose, and they normally begin to run when the crime is  
22 complete. *Id.*

23 Winn argues that the government cannot prosecute him for any claim submitted before  
24 July 31, 2008—five years before the grand jury returned the Indictment in this case. The  
25 government concedes that the Indictment alleges the violations occurred on the dates Medicare  
26 *paid* Desert, but the healthcare fraud violations occurred when fraudulent claims were *submitted*  
27 to Medicare.

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1 Counts one through five allege fraudulent claims paid by Medicare between November  
2 27, 2007, and April 14, 2008. The government's supplement indicates these claims were  
3 received by Noridian between November 21, 2007, and April 10, 2008. The Indictment, the  
4 government's response to the motion, and the government's supplement do not indicate whether  
5 the government knows when the claims were submitted, which the government acknowledges is  
6 the "operative date" for each violation. Counts one through five occurred more than five years  
7 before the Indictment was returned on July 31, 2008. These counts are therefore time-barred  
8 unless the crime of healthcare fraud is a continuing offense which effectively extends the statute  
9 of limitations until the last fraudulent submission was made.

10 Counts six through nine of the Indictment allege fraudulent claims were paid by  
11 Medicare within five years of July 31, 2013. The government's supplement states the claims  
12 were received by Noridian on August 3, 2013. Again, the government does not indicate when  
13 these claims were submitted to Medicare. If they were submitted to Medicare prior to July 31,  
14 2008, the crimes charged in counts six through nine are time-barred unless the crime of  
15 healthcare fraud is a continuing offense.

16 Counts ten and eleven of the Indictment allege fraudulent claims were paid by Medicare  
17 on August 27, 2008. The government's supplement indicates the claims were received by  
18 Noridian on August 24, 2008. Once, again, the government does not indicate when these claims  
19 were submitted to Medicare, which the government acknowledges is the operative date for the  
20 violations. Given that these claims were paid within three days of receipt, it seems reasonable to  
21 infer they were submitted after July 31, 2008. In a footnote to the government's supplement, the  
22 government states that because the claims were submitted electronically "the date of receipt by  
23 Medicare is approximately equal to the date of submission." The government has offered to  
24 provide the underlying documents to counsel for the Defendant for his review. However, when  
25 the claims were actually submitted to Medicare is a factual issue which the court cannot decide  
26 based on the moving and responsive papers presented in connection with this motion.

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### 1           **C.     The Continuing Offense Doctrine**

2           In 1939, the Supreme Court defined a continuing offense as “a continuous, unlawful act  
3 or series of acts set on foot by a single impulse and operated by an unintermittent force, however  
4 long a time it may occupy.” *United States v. Midstate Horticultural Co.*, 306 U.S. 161, 166  
5 (1939) (internal citation and quotation omitted). A continuing offense “is a term of art that does  
6 not depend on everyday notions or ordinary meaning.” *United States v. Reitmeyer*, 356 F.3d  
7 1313, 1321 (10th Cir. 2004). The continuing offense doctrine is an exception to the general rule  
8 that a crime is complete, and the statute of limitations begins to run, as soon as every element of  
9 the crime has occurred. If a crime is a continuing offense, the statute of limitations does not  
10 begin to run until the last act of the offense. *Black’s Law Dictionary*, 1186 (9th ed. 2009).

11           Until 1970 when the Supreme Court decided the landmark case of *Toussie v. United*  
12 *States*, the lower courts had little guidance on the test for identifying a continuing offense. In  
13 *Toussie*, the Supreme Court examined the relationship between the continuing offense doctrine  
14 and the statute of limitations and formulated a two-part test to determine when an offense should  
15 be considered continuing for statute of limitations purposes.

### 16           **D.     The *Toussie* Test**

17           *Toussie* held that a crime is a continuing offense only where: (1) the explicit language of  
18 the criminal statute compels such a conclusion; or (2) the nature of the crime is such that  
19 Congress “must assuredly have intended” that it be treated as a continuing one. *Toussie*, 397  
20 U.S. at 115. Conspiracy is the classic example of a continuing offense. *Id.* at 122. A conspiracy  
21 continues as long as the conspirators engage in overt acts in furtherance of their conspiracy. *Id.*  
22 A conspiracy meets the second prong of the *Toussie* test for a continuing offense because “the  
23 nature of a conspiracy is such “that each day’s acts bring a renewed threat of the substantive evil  
24 Congress sought to prevent.” *Id.*

25           *Toussie* involved a prosecution and conviction under the Universal Military Training and  
26 Service Act and implementing regulation. Under the Act, male citizens between the ages of  
27 eighteen and twenty-six were required to register for the draft, and a presidential proclamation  
28 required eligible men to register within five days of turning eighteen. *Toussie* was required to

1 register between June 23 and 28, 1959, but did not do so. He was indicted on May 3, 1967,  
2 convicted and appealed, arguing that his crime was complete in 1959, and his prosecution barred  
3 by the statute of limitations. The government agreed that the crime was complete in 1959, but  
4 argued that the crime continued to be committed each day Toussie failed to register.

5 The Supreme Court reversed Toussie's conviction, holding that neither the Act, nor the  
6 implementing regulation, imposed a continuing duty to register. As a result, the crime was  
7 complete, and the statute of limitations began to run, five days after Toussie's eighteenth  
8 birthday. The opinion relied on a line of cases holding that criminal statutes of limitations  
9 should be liberally construed in favor of repose and normally begin to run when the crime is  
10 complete. *Id.* at 115. The doctrine of continuing offenses should only be applied in limited  
11 circumstances when "the explicit language of the substantive criminal statute compels such a  
12 conclusion, or the nature of the crime involved is such that Congress must assuredly have  
13 intended that it be treated as a continuing one." *Id.*

14 The regulation in *Toussie* contained language that the duty to register "shall continue at  
15 all times," and the Supreme Court acknowledged that this language "admittedly might be  
16 construed" as the government argued. *Id.* at 116. Although the regulation referred to registration  
17 as a continuing duty, the Supreme Court found that there was no language in the statute itself that  
18 clearly indicated the failure to register was a continuing duty. The Supreme Court exhaustively  
19 examined the history of the Act, its predecessor statutes, and the implementing regulations in  
20 reaching its conclusion that the Act was not intended to treat continued failure to register as a  
21 continuing offense.

22 Tracing various draft acts from World War I, the Supreme Court found that it was "clear  
23 that throughout the administration of the first draft law, registration was thought of as a single,  
24 instantaneous act to be performed at a given time, and failure to register at that time was a  
25 completed criminal offense." *Id.* at 117. The Supreme Court concluded that the statute itself,  
26 apart from the administrative regulation, did not require it to be construed as a continuing  
27 offense. *Id.* Congress did not explicitly define the failure to register as a continuing offense and  
28 in these circumstances, the Court should not choose the harsher alternative which would

effectively extend the statute of limitations until as late as thirteen years after the crime was first complete. *Id.* at 122.

### **E. Continuing Offenses**

#### **1. *Toussie*'s Test First Prong: Explicit Congressional Language**

Congress has explicitly created continuing offenses in a number of criminal statutes. In 22 U.S.C. § 618(e), Congress provided that the failure to register as a foreign agent within ten days is a continuing offense. Congress also explicitly provided that concealment of a bankruptcy's assets is a continuing offense in 18 U.S.C. § 3284 and provided that the statute of limitations "shall not begin to run until such final discharge or denial of discharge." Congress has not explicitly designated most federal criminal statutes as continuing offenses. However, a body of federal common law has developed finding certain federal offenses are continuing violations.

#### **2. The *Toussie* Test Second Prong: Crimes Congress "Must Assuredly Have Intended" to be Continuing Offenses**

Federal courts have held that escape, kidnapping and crimes of possession are continuing offenses. The federal kidnapping statute is a continuing offense because the crime continues as long as the victim is held. *See United States v. Garcia*, 854 F.2d. 340, 343-44 (9th Cir. 1988). The purpose of the federal kidnapping statute is to protect the victim not only from forceable abduction but from the continuing harm of confinement and continued detention. *Id.* The essence of the offense is the involuntariness of the seizure and detention. *Id.* As a continuing offense, the statute of limitations for kidnapping does not begin to run until the victim ceases to be held. *Id.*

The Supreme Court has held that an escape from federal custody under 18 U.S.C. § 751(a) is a continuing offense and that an escapee can be held liable for failure to return to custody as well as for his initial departure. *United States v. Bailey*, 444 U.S. 394, 413 (1980). Escape is a continuing offense because of the continuing threat to society posed by an escaped prisoner. *Id.* In *Bailey*, the Supreme Court found that because of the continuing threat to society posed by an escaped prisoner Congress "must assuredly have intended" that escape be treated as a continuing offense. *Id.* (citing *Toussie*, 397 U.S. at 115). The defendant argued that *Toussie*

1 calls for restraint in labeling crimes as continuing offenses. The Supreme Court found that the  
2 justification for the restraint “is the tension between the doctrine of continuing offenses and  
3 policy of repose embodied in statutes of limitations.” *Id.* (citing *Toussie*, 397 U.S. at 114-15).  
4 However, under 18 U.S.C. § 751(e), the statute of limitations is tolled for the period that the  
5 escapee remains at large, and therefore “[t]his tension is wholly absent.” *Id.* at 413-14.

6 Federal crimes of possession have also routinely been held to be continuing offenses. *See*  
7 *United States v. Krstic*, 558 F.3d. 1010, 1017 (9th Cir. 2009). *Krstic* involved a prosecution  
8 under 18 U.S.C. § 1546(a) for obtaining an alien registration card by means of a false statement.  
9 The section under which *Krstic* was prosecuted prohibited possession of an otherwise authentic  
10 document that one knows has been procured by means of a false claim or statement. *Krstic*  
11 appealed his conviction, arguing the prosecution was barred by a five-year statute of limitations  
12 because the false statement was made more than five years before the indictment was returned.  
13 The Ninth Circuit found *Krstic* was charged with a possessory offense, not a false statement  
14 offense. In possessory offenses, the statute of limitations does not begin to run until the  
15 possessor parts with the contraband.

16 The Ninth Circuit has held a number of offenses qualify as continuing offenses. *See, e.g.,*  
17 *Eichelberger v. United States*, 252 F.2d. 184 (9th Cir. 1992) (holding an offense of illegal  
18 possession of firearms in violation of 18 U.S.C. §§ 5811–5814 is a continuing offense because  
19 the offense began on the date the guns were received by the defendant and continued until the  
20 date set forth in the indictment); *United States v. Kayfez*, 957 F.2d. 677, 678 (9th Cir. 1992) (per  
21 curiam) (holding the crime of possession of counterfeit notes under 18 U.S.C. § 472 is a  
22 continuing offense because the defendant possessed the counterfeit notes continuously from the  
23 time he made them until they were seized); *United States v. Gray*, 876 F.2d. 1411, 1418 (9th Cir.  
24 1989), *cert. denied*, 495 U.S. 930 (1990) (holding failure to appear for sentencing in violation of  
25 18 U.S.C. § 3146(a) is a continuing offense because of the danger to society posed by having  
26 convicted criminals at large); *United States v. Merino*, 44 F.3d. 749, 754 (9th Cir. 1994) (holding  
27 a violation of 18 U.S.C. § 1073 for unlawful flight to avoid prosecution is a continuing offense

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1 because of the “threat to the integrity and authority of the court” posed by a defendant who  
2 refuses to abide by lawful court orders).

3 None of these crimes meet the first prong of the *Toussie* test because Congress did not  
4 include explicit language in the statutes themselves proclaiming the offenses were continuing  
5 offenses. The Ninth Circuit has determined that these crimes are continuing offenses by  
6 applying the second prong of the *Toussie* test, which examines the nature of the offense itself.  
7 Once committed, these crimes continue until they are affirmatively ended, i.e. until the  
8 kidnapped victim is returned; the escaped prisoner, defendant failing to appear, or person fleeing  
9 prosecution is apprehended; or the person no longer possesses contraband.

10 The Ninth Circuit has not yet decided whether a healthcare violation under 18 U.S.C.  
11 § 1347 is a continuing offense. The government argues that because the healthcare fraud statute  
12 is modeled after the bank fraud statute, and the Ninth Circuit has held that bank fraud is a  
13 continuing offense, the crime of healthcare fraud is a continuing offense. The government  
14 contends that a healthcare fraud crime is not completed until the last fraudulent submission to  
15 Medicare is made.

16 The mail fraud, wire fraud, bank fraud, and healthcare fraud statutes are all similarly  
17 structured and use nearly identical language. The mail fraud statute provides in pertinent part,  
18 “Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . places in  
19 any post office or authorized depository for mail matter, any matter or thing to be sent or  
20 delivered by the Postal Service . . . shall be fined . . . or imprisoned . . .” 18 U.S.C. § 1341.

21 The wire fraud statute provides in pertinent part, “Whoever having devised or intending  
22 to devise any scheme or artifice to defraud, . . . transmits or causes to be transmitted by means of  
23 wire, radio, or television communications . . . any writings, signs, signals, pictures, or sounds for  
24 the purpose of executing such scheme or artifice, shall be fined . . . or imprisoned . . .” 18  
25 U.S.C. § 1343.

26 The bank fraud statute provides in pertinent part, “Whoever knowingly executes or  
27 attempts to execute a scheme or artifice – (1) to defraud a financial institution; or (2) obtain any

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1 of the monies . . . of a financial institution, by means of false or fraudulent pretenses, or  
2 representations, or promises; shall be fined . . . or imprisoned . . .” 18 U.S.C. § 1344.

3 The healthcare fraud statute provides in pertinent part, “Whoever knowingly or willfully  
4 executes, or attempts to execute, a scheme or artifice . . . to defraud any healthcare benefit  
5 program . . . in connection with the delivery of or payment for healthcare benefits, items or  
6 services, shall be fined . . . or imprisoned . . .” 18 U.S.C. § 1347.

7 All of these statutes contain the same “scheme or artifice to defraud” language. The bank  
8 fraud and healthcare fraud statutes prohibit executions or attempted executions of a scheme or  
9 artifice due to fraud. The mail fraud statute prohibits placing fraudulent materials in the mail.  
10 The wire fraud statute prohibits transmitting fraudulent materials electronically. The *mens rea*  
11 requirements are also different. The bank fraud statute requires a proof of a knowing execution  
12 or attempted execution. The healthcare fraud statute requires a knowing and willful execution or  
13 attempted execution.

14 In *United States v. Niven*, 952 F.2d. 289 (9th Cir. 1991), *overruled on other grounds by*  
15 *United States v. Scarano*, 76 F.3d 1471, 1477 (9th Cir. 1996), the Ninth Circuit held that the  
16 offenses of mail fraud and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343 were not  
17 continuing offenses in the context of a sentencing guideline issue. Citing *Toussie*, the Ninth  
18 Circuit acknowledged the doctrine of continuing offenses should only be applied in limited  
19 circumstances. *Id.* at 293. Applying *Toussie*, the Ninth Circuit determined that the crimes of  
20 mail fraud and wire fraud criminalize each specific use of the mail or wire and that each offense  
21 is complete when the fraudulent matter is placed in the mail or transmitted by wire. The *Niven*  
22 court acknowledged that “the analysis turns on the nature of the substantive offense, not on the  
23 specific characteristics of the conduct in the case at issue.” *Id.* However, the decision did not  
24 provide an analysis or rationale for its holding that mail and wire fraud criminalize each specific  
25 use of the mail or wire and are completed when the fraudulent matter is placed in the mail or  
26 transmitted by wire.

27 The *Molinaro* decision relied upon by the government by analogy found that the bank  
28 fraud statute punishes each execution of a fraudulent scheme rather than each act in furtherance

1 of such a scheme. *United States v. Molinaro*, 11 F.3d. 853, 859 (9th Cir. 1993). Molinaro was  
2 convicted of thirty-one counts of bank fraud and conspiracy to defraud the United States in  
3 making false entries in the books of a federally-insured savings and loan he owned. He and his  
4 co-defendant appealed the convictions on three grounds: (1) the evidence was insufficient; (2)  
5 proof at trial constituted an amendment or variance from the indictment; and (3) the counts were  
6 multiplicitous. The defendants argued that counts one through thirty of the indictment were  
7 steps in the same scheme to defraud and were, therefore, multiplicitous. The Ninth Circuit  
8 concluded that the form of the indictment and individual counts reflected the government's view  
9 that each act in furtherance of the overall scheme to defraud the bank constituted a separate  
10 violation of § 1344. The Ninth Circuit noted that the government's view had been rejected by  
11 the First and Fifth Circuits, which had each held that each execution of a scheme to defraud a  
12 financial institution, rather than each act in furtherance of a scheme to defraud, constitutes a  
13 violation of § 1344. *Id.* at 859. The government argued that the Ninth Circuit holding in *United*  
14 *States v. Poliak*, 823 F.2d 371, 372 (9th Cir. 1987), that the mail fraud statute, which  
15 criminalizes each use of the mail in furtherance of a scheme to defraud, should be applied to the  
16 bank fraud statute.

17 Poliak was charged with bank fraud by a check kiting scheme. Each count of the  
18 indictment charged the kiting of a separate check. *Poliak* held that § 1344 allowed charging the  
19 execution of the scheme to defraud as a separate act, and that each check kiting transaction  
20 constituted "a different and separate execution of the scheme to defraud banks." *Id.* (citing  
21 *Poliak*, 823 F.2d at 372). *Molinaro* reaffirmed the Ninth Circuit's holding in *Poliak* "that the  
22 unit of the offense created by § 1344 is not each act in furtherance of the scheme to defraud, but  
23 each execution or attempted execution of the scheme to defraud." 11 F.3d at 860. The *Molinaro*  
24 court then turned to the obvious question of what constitutes an execution of the scheme and  
25 concluded that it "depends on the particular facts of each case." *Id.* The Ninth Circuit affirmed  
26 the conviction but remanded for resentencing because, although the government's proof at trial  
27 was sufficient on each of the counts, some of the counts charging a scheme to defraud under §  
28 1344 were multiplicitous. *Id.* at 864. It directed the district court to resentence the defendant,

1 indicating that a sentence could be imposed on each count for each execution of the scheme, but  
2 it had to be run concurrently with each sentence on a count that was part of the same execution.

3 In *United States v. Nash*, 115 F.3d. 1431, 1441 (9th Cir. 1997), the Ninth Circuit held that  
4 a violation of 18 U.S.C. § 1344 for bank fraud is a continuing offense. *Nash* was also a  
5 sentencing guideline case. The Ninth Circuit reasoned that bank fraud punishes the execution of  
6 a scheme to defraud or obtain money, which is language that suggests the violation should be  
7 treated as a continuing one. The *Nash* decision acknowledged that *Niven* held that mail and wire  
8 fraud could not be continuing violations because these offenses punish each use of the mail or  
9 wires. *Nash* concluded that, by contrast, a § 1344 violation “involves the execution of the  
10 overall scheme,” but the court did not articulate its rationale for this conclusion.

11 In *United States v. Najjor*, 255 F.3d. 979 (9th Cir. 2001), the Ninth Circuit addressed  
12 whether defrauding a bank in violation of 18 U.S.C. § 1344 was a continuing offense for  
13 purposes of the statute of limitations. Najjor was charged and convicted of two counts of bank  
14 fraud for defrauding two different financial institutions. He challenged his conviction on one of  
15 the counts of bank fraud on statute of limitations grounds. The Ninth Circuit recognized that the  
16 statute of limitations normally begins to run when the crime is complete. *Id.* at 983. The  
17 defendant argued that all of the acts constituting the crime of bank fraud were committed prior to  
18 December 2, 1996, when the loan was approved because by then, all of the false documents had  
19 been submitted which put the bank at risk. However, because Najjor signed a loan note on  
20 December 11, 1986, in furtherance of the bank fraud scheme within in the ten-year statute of  
21 limitations, the Ninth Circuit held that the indictment was returned within the statute of  
22 limitations, and the government could prosecute him for the entire scheme to defraud the bank.  
23 *Id.* at 983-84.

24 It is difficult to understand the Ninth Circuit’s rationale for holding that bank fraud is a  
25 continuing offense, but mail and wire fraud offenses are not. The Supreme Court has held that  
26 the purpose of the mail and wire fraud statute is to prevent the use of the post office and  
27 communications media as a means to effectuate fraud. *See Parr v. United States*, 363 U.S. 370,  
28 389 (1960). *Niven* did not cite *Parr* but relied on the second prong of the *Toussie* test in reaching

1 its holding. The *Niven* court acknowledged that under *Toussie*, “the analysis turns on the nature  
2 of the substantive offense, not on the specific characteristics of the conduct in the case at issue.”  
3 952 F.2d at 293. It concluded, without explaining, that “the offenses at issue--18 U.S.C.  
4 §§ 1341 and 1343--criminalize each specific use of the mail or wire. Each offense is complete  
5 when a fraudulent matter is placed in the mail or transmitted by wire, respectively.” *Id.*

6 *Nash* and *Molinaro* do not expressly articulate what it is about the nature of the offense of  
7 bank fraud that makes it meet the second prong of the *Toussie* test, an offense such that Congress  
8 “must assuredly have intended” be treated as a continuing one. The rationale seems to be that  
9 the bank fraud statute criminalizes a scheme to defraud in contrast to the mail fraud and wire  
10 fraud statutes, which criminalize each use of the mail and wire. However, as noted, all three  
11 statutes have the same language prohibiting a scheme or artifice to defraud.

12 None of the Courts of Appeals have addressed whether healthcare fraud is a continuing  
13 offense. One published and two unpublished district court decisions have held that healthcare  
14 fraud is a continuing offense. See *United States v. Mermelstein*, 487 F. Supp. 2d. 242, 255  
15 (E.D.N.Y. 2007); *United States v. Schickle*, 2010 WL 2680856 at \*1 (D. Me July 1, 2010);  
16 *United States v. Refert*, 2007 U.S. Dist. LEXIS 548 at \*6 (D.S.D. Jan. 3, 2007). Each of these  
17 decisions is based on fraudulent scheme analysis. In *Mermelstein*, the defendant was charged  
18 with one count of healthcare fraud, and the court held that the statute of limitations did not bar a  
19 prosecution for conduct that took place more than five years before the indictment was filed.  
20 The court reasoned that the indictment defined a single scheme to defraud healthcare benefits  
21 programs though an ongoing pattern of criminal behavior, and the scheme was perpetrated in  
22 essentially the same manner throughout the period charged in the indictment. As a result, the  
23 submission of various fraudulent claims was properly charged as a single continuing offense that  
24 was not completed until after the healthcare fraud statute was enacted and was well within the  
25 statute of limitations. 487 F. Supp. 2d. at 255.

26 *Schickle* concluded that “a violation of 18 U.S.C. § 1347 requires the development and  
27 execution of a scheme to defraud and, thus, is properly charged as a continuing offense.” 2010  
28 WL 2680856 at \*1. The *Schickle* court was persuaded by the government’s argument which

1 relied on the similarities between the healthcare fraud statute and the bank fraud statute and the  
2 defendant's failure to offer any reason why the bank fraud cases should not be applied to the  
3 healthcare fraud statute.

4 *Refert* applied the Ninth Circuit's holding in *Nash*, which suggested that healthcare fraud  
5 should be treated as a continuing offense. *Refert* acknowledged that the healthcare fraud statute  
6 is modeled after the bank fraud statute, and that the bank fraud statute was modeled after the  
7 federal mail and wire fraud statutes. It did not address or analyze how bank fraud could be a  
8 continuing offense, but the mail and wire fraud statutes on which it was modeled are not. *Refert*  
9 also found that the nature of the healthcare fraud charged in the indictment, which involved the  
10 defendant going to a facility and representing she was eligible for healthcare services and  
11 continuing to present for healthcare services, was a continuing crime.

12 In this case, the government does not claim that Congress expressly proclaimed that a  
13 violation of § 1347 is a continuing one, and nothing in the plain language of the statute itself  
14 compels such a conclusion. The first prong of the *Toussie* test has clearly not been met. The  
15 court must therefore determine whether the nature of a § 1347 violation is such that Congress  
16 "must assuredly have intended" that it be treated as a continuing violation. The government  
17 contends that the healthcare fraud is a continuing offense that does not cease until the last  
18 execution of the fraud occurs, that is, until the last fraudulent claim is submitted to Medicare.  
19 The government seems to argue that healthcare fraud punishes a scheme to defraud, like the bank  
20 fraud statute, and each execution of the scheme may be separately charged. The government  
21 maintains that because healthcare fraud is a continuing offense, it may charge all eleven counts  
22 as long as the last false submission fell within the five-year statute of limitations.

23 The government did not charge this as a single one-count scheme to defraud over a  
24 period of time. Rather, the government brought an eleven-count Indictment for each fraudulent  
25 submission made to Medicare. However, even if the government had charged this as a single-  
26 count scheme occurring over a period of time, the court would still be required to apply the  
27 *Toussie* test to determine whether healthcare fraud is a continuing offense such that the

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1 government may prosecute conduct occurring more than five years before the Indictment was  
2 returned.

3 As *Toussie* makes clear, the second prong of the test focuses on whether the nature of the  
4 crime of healthcare fraud is one that Congress “must assuredly have intended” that it be treated  
5 as a continuing violation, not the conduct charged in the Indictment.

6 *Toussie* found the crime of failing to register for the draft was not a continuing offense  
7 even though the regulation contained language that could have been interpreted as a continuing  
8 offense language. It comprehensively examined the history of the Act and its predecessor  
9 statutes finding that the failure to register had always been regarded as an instantaneous event. It  
10 also found that although the statute could be interpreted as the government argued, where two  
11 interpretations were possible, the court should not pick the one that has harsher consequences on  
12 a criminal defendant.

13 Both prongs of the *Toussie* test focus on the intent of Congress, *i.e.*, whether Congress  
14 used explicit language proclaiming the offense a continuing one, or, “must assuredly have  
15 intended” that the crime be treated as a continuing offense because of the nature of the offense  
16 itself. The cases that rely upon the conduct charged in the indictment to determine whether a  
17 statute is a continuing violation stray from the second prong of the *Toussie* test, which requires  
18 the court to focus on the nature of the crime (statute) itself, not the conduct charged, that is, the  
19 conduct alleged to violate the statute.

20 The continuing offense doctrine extends the statute of limitations for a category of crimes  
21 that continue to cause harm to society at large or individual victims until the crime is  
22 terminated—that is, when the escapee is apprehended or turns himself in, when the kidnapped  
23 victim is released, or when the last act in furtherance of a conspiracy ceases. The modern trend  
24 seems to expand the doctrine for fraud-type violations by focusing on the conduct charged in the  
25 indictment rather than the crime itself by considering the offense as part of a continuing  
26 fraudulent scheme. However, *Toussie* teaches that it is the nature of the crime, not the conduct  
27 charged, that determines if the crime is a continuing offense. The Ninth Circuit recognized this

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1 in *Niven* when it stated “the analysis turns on the nature of the substantive offense, not the  
2 specific characteristics of the conduct in the case at issue.” 952 F.2d at 293.

3 The statute of limitations normally begins to run when the crime is complete, *i.e.*, when  
4 each element of the crime has occurred. *United States v. Smith*, 740 F.2d at 736. The Supreme  
5 Court has directed that statutes of limitations are to be construed liberally in favor of repose, and  
6 the continuing offense doctrine should be applied only in limited circumstances. *Toussie*, at 115.  
7 The Ninth Circuit has not yet held whether the crime of healthcare fraud is a continuing offense.  
8 The statute contains no language expressly proclaiming a § 1347 violation as a continuing  
9 offense, and the government does not contend it does. Congress knows how to declare an  
10 offense a continuing offense and has done so in the past. The court must therefore apply the  
11 second prong of the *Toussie* test to determine whether the crime of healthcare fraud is one that  
12 Congress must assuredly have intended to be treated as a continuing one.

13 The government argues that the conduct charged in the Indictment was continuous, and  
14 therefore, the crimes were not complete until the last false submission was made to Medicare.  
15 However, focusing on how the government alleges Winn committed the offense, rather than on  
16 the nature of the statute itself, would largely eviscerate the second prong of the *Toussie* test.  
17 *Toussie*’s holding requires the court to examine *congressional* intent, not the individual conduct  
18 charged in the case before the court.

19 The court finds that there is nothing about the nature of the crime of healthcare fraud that  
20 makes it a continuing offense under the second prong of the *Toussie* test. The court finds that the  
21 offense punishes a knowing, willful execution, or attempted execution, to defraud a healthcare  
22 benefits program. The crime is complete, and the statute of limitations begins to run, when the  
23 false or fraudulent claim is submitted for payment. Thus, counts one through five of the  
24 indictment are barred by the five-year statute of limitations as they clearly occurred more than  
25 five years before the Indictment was returned on July 31, 2013.

26 The court cannot determine from the information provided in the moving and responsive  
27 papers whether the remaining counts are time-barred because the government has not provided  
28 sufficient information for the court to determine when the claims were submitted for payment.

1 The Indictment alleges that the false claims alleged in counts six through nine were submitted on  
 2 August 6, 2008, and the government's supplement reports the claims were received  
 3 electronically by the third-party administrator for Medicare on August 4, 2008. If the claims  
 4 were submitted before July 31, 2008, they are time-barred. If they were submitted on or after  
 5 July 31, 2008, they are not. The same is true with respect to counts ten and eleven, which were  
 6 paid by Medicare on August 27, 2008, and received by Noridian, the third-party administrator  
 7 for Medicare, on August 24, 2008.

### 8 CONCLUSION

9 Every statute of limitations may permit a rogue to escape. *See Pendergast v. United*  
 10 *States*, 317 U.S. 412, 418 (1943). However, the Supreme Court has directed courts deciding  
 11 when a statute of limitations begins to run to consider the purposes of the statute of limitations.  
 12 Criminal statutes of limitations are to be liberally interpreted in favor of repose and normally  
 13 begin to run when the crime is complete. The Supreme Court has clearly held that the doctrine  
 14 of continuing offenses should be applied only in limited circumstances. In this case, both sides  
 15 agree that the five-year limitations period established by 18 U.S.C. § 3282 applies. The  
 16 government does not contend that the first prong of the *Toussie* test has been met. Applying the  
 17 second prong of the *Toussie* test, the court finds that there is nothing about the nature of the  
 18 crime of healthcare fraud that indicates Congress must assuredly have intended that it be a  
 19 continuing offense.

20 For the reasons stated,


21 **IT IS RECOMMENDED** that Winn's Motion to Dismiss (Dkt. #32) be **GRANTED in**  
 22 **part** and **DENIED in part**. The motion should be GRANTED to the extent that counts one  
 23 through five of the Indictment should be DISMISSED as time-barred. A decision on the  
 24 remaining counts should be DEFERRED until trial when the record is fully developed  
 25 concerning when the allegedly false claims charged in counts six through eleven of the  
 26 Indictment were allegedly submitted to Medicare. Any claims submitted prior to July 31, 2008,

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1 five years before the Indictment was returned on July 31, 2013, should be DISMISSED as time-  
2 barred.

3 DATED this 21st day of July, 2014.

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6 PEGGY A. LEEN  
7 UNITED STATES MAGISTRATE JUDGE  
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